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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

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3 UNITED STATES OF AMERICA,

4 v.

16 CR 371 (RA)

5 DEVON ARCHER,

6 Defendant.

7 -----x

8 New York, N.Y.
9 February 28, 2022
12:00 p.m.

10 Before:

11 HON. RONNIE ABRAMS,

District Judge

12 APPEARANCES

13 DAMIAN WILLIAMS

14 United States Attorney for the
15 Southern District of New York

REBECCA MERMELSTEIN

16 NEGAR TEKEEI

Assistant United States Attorneys

17 JEFFREY T. SCHWARTZ

18 CRAIG A. WENNER

Attorneys for Defendant

19
20 ALSO PRESENT: NICHOLAS KROLL, FBI

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(Case called)

MS. MERMELSTEIN: Good morning, your Honor. Rebecca Mermelstein, for the government. With me is Negar Tekeei and Special Agent Nicholas Kroll.

THE COURT: Good morning to all of you.

MR. SCHWARTZ: Good morning. Matthew Schwartz and Greg Wenner, for the defendant, Mr. Archer.

THE COURT: Good afternoon to both of you as well.

You are all familiar with the procedural history of this case. After Mr. Archer was convicted of conspiracy to commit securities fraud and securities fraud, I denied his motion for acquittal, but granted his Rule 33 motion for a new trial due to a concern that he did not have the requisite intent to commit the crimes charged.

On appeal, the Court of Appeals for the Second Circuit clarified the standard on a Rule 33 motion, reversed my grant of a new trial, reinstated the conviction, and remanded to me for sentencing.

Under the law, "a guilty verdict, not set aside, binds the sentencing court to accept the facts necessarily implicit in the verdict." That's a quote from the *Houriha* case, 960 F.2d at 218. I must thus accept for purposes of this sentencing that Mr. Archer did indeed have the requisite intent to commit the crimes for which he was convicted.

In connection with today's proceeding, I have reviewed

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1 the following submissions: The presentence investigation
2 report, revised as of January 21st of this year, including a
3 recommendation that I vary downward from the sentencing
4 guidelines; Mr. Archer's sentencing memorandum, dated
5 February 14, with 44 letters of support; the government's
6 sentencing memorandum, dated February 21st, 2022; a letter from
7 the independent trustees of the Burnham Investors Trust, now
8 RMB Investors Trust, dated February 18th; a letter from the
9 Omaha School Employees' Retirement System, dated November 30,
10 2021; Mr. Archer's response to the government's sentencing
11 submission, dated February 23rd.

12 Have you each received all of these submissions? And
13 am I missing anything?

14 MS. MERMELSTEIN: We have, your Honor, and you're not
15 missing anything.

16 MR. SCHWARTZ: We have received all of those things.
17 Your Honor didn't say it, but there were additional
18 materials provided with our original sentencing submission,
19 including a letter from Mr. Archer himself and our objections
20 to the PSR.

21 THE COURT: Yes. And I have reviewed all of those as
22 well. Thank you.

23 Let's begin by discussing the presentence report,
24 which, as you all know, is prepared by the United States
25 Probation Office.

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1 Mr. Schwartz, have you reviewed the presentence report
2 and discussed it with your client?

3 MR. SCHWARTZ: Yes.

4 THE COURT: Mr. Archer, have you had enough time and
5 opportunity to review the presentence report with your counsel?

6 THE DEFENDANT: Yes.

7 THE COURT: Mr. Schwartz, I know you have a host of
8 objections to the presentence report, and we can go through
9 them now, but, just to clarify, are you renewing all of the
10 ones you made, just the 12 in your footnote 12 of your
11 submission, or a subset?

12 MR. SCHWARTZ: I'm renewing them all except for a
13 handful of matters that were corrected or updated by the
14 probation office in the preparation of the final PSR. I have a
15 suggestion for how we could go through them efficiently, if
16 your Honor wants to hear it.

17 THE COURT: Sure.

18 MR. SCHWARTZ: Because I think the majority of the
19 objections fall into one of two categories, and they're
20 obviously related – one is the description of the offense
21 conduct and the other is the application of the guidelines.

22 We can certainly go paragraph by paragraph through the
23 existent PSR and try to conform what is in there to the
24 evidence and then apply that to the sentencing guidelines. I
25 would suggest, as we did in our submission, instead, that your

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1 Honor should simply reject the characterization of the offense
2 conduct as it's set forth in the PSR and, instead, adopt the
3 characterization that was in your Honor's November 2018
4 opinion, which, as we point out, you can do consistent with
5 your observation at the beginning of this proceeding, that you
6 have to accept, for purposes of these proceedings, Mr. Archer's
7 guilt and the facts that are necessarily found by a jury in
8 convicting Mr. Archer. Nonetheless, your opinion speaks in the
9 language of the weight of the evidence and the preponderance of
10 the evidence, which are the relevant standards for sentencing.
11 I suspect if your Honor had known it was going to be the
12 standard, you would have spoken in the language of whether the
13 evidence preponderated heavily at the time, but that's a
14 discussion for a different day. But we can go through, and I
15 can point to the language of that opinion where your Honor
16 makes findings about the weight of the evidence or the
17 preponderance of the evidence, and I would suggest that simply
18 adopting those findings for purposes of the PSR is the most
19 efficient way to proceed and is obviously consistent with the
20 work that you've already done.

21 THE COURT: I don't think I can do that. I don't
22 think I can adopt the characterization that was in my Rule 33
23 opinion and be faithful to the jury's verdict.

24 There are some tweaks, I think, that could be made to
25 some of the paragraphs in the PSR if you thought it was

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1 important. I know, also, separately, at some point, you had
2 requested noting some procedural history regarding my opinion
3 and the circuit's opinion that Mr. Archer maintains his
4 innocence and objects to the characterization in the PSR, and
5 I'm happy to put language to that effect in, and I'm happy to
6 tweak a few of the paragraphs, but, beyond that, I don't think
7 I can do that consistent with the facts implicit in the jury's
8 verdict in light of the Second Circuit's opinion.

9 MR. SCHWARTZ: Well, let me question that concept a
10 little bit.

11 I don't think that there was anything that was
12 necessarily found by the jury convicting that spoke to
13 Mr. Archer's specific intent with respect to, in particular,
14 the first and third bond issuances and the existence and role
15 of the clients of Atlantic and Hughes, who were victims of the
16 larger fraud, but were not reasonably foreseeable victims to
17 Mr. Archer. Again, your Honor reviewed that evidence and found
18 that the preponderance of the evidence demonstrated that
19 Mr. Archer didn't know about that --

20 There were plenty of ways, in a hypothetical world,
21 that the jury could have convicted Mr. Archer that are not
22 consistent with the government's overarching narrative that he
23 knew absolutely everything that Jason Galanis was doing, and
24 that is largely the narrative that's adopted by the PSR.

25 For example, it would be entirely consistent with the

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1 jury's verdict to find that Mr. Archer was less than honest
2 when he spoke to Morgan Stanley and that had the effect of
3 allowing the bonds to flow through the Rosemont Seneca Bohai
4 account, which, on the government's view, was used for
5 regulatory capital for some of the entities at issue here and
6 that facilitated the fraud. That would make him guilty of both
7 substantive and conspiracy to commit securities fraud and would
8 be, therefore, entirely consistent with the jury's verdict, but
9 would not be consistent with the overall theory of the
10 government or the specific facts set out in the PSR.

11 So I don't think that you are bound to accept the
12 overarching theory that's put forward by the government and
13 adopted by probation in the PSR.

14 I think the other way to do it is, since there's never
15 been that much disagreement about what the core fraud here was,
16 your Honor could remove references to Mr. Archer's intent and
17 make specific findings about his intent or what was reasonably
18 foreseeable to him. But I don't think it would be -- it is
19 certainly not necessary. Unless your Honor has had a change in
20 heart about your view of the evidence, I don't think it would
21 be consistent with the evidence to adopt anything like the
22 statement of facts set forth in the PSR right now.

23 THE COURT: I don't think that's right.

24 I don't think I need to accept every fact argued by
25 the government at summation, but I do think I have to accept

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1 the facts that are implicit in a finding of guilt with respect
2 to these crimes. In other words, the jury found Mr. Archer
3 guilty of the charged crimes as alleged in the indictment, and
4 the government cited to the trial transcript, as I instructed
5 the jury, and I'm happy to read that out loud, but I have to
6 accept that he had the requisite intent to commit those crimes,
7 and, in doing so, I must accept that he knew that the
8 investment advisor clients were being defrauded and that the
9 tribal bond proceeds were being misappropriated.

10 As the government notes in its letter, the way this
11 Court defined the scheme for the jury's consideration, just
12 simply and referencing the indictment – and I'm reading from
13 the trial transcript at page 4143 to 4144 – the indictment
14 alleges that the securities fraud conspiracy charged in Count
15 One and the substantive securities fraud offense charged in
16 Count Two relate to an alleged scheme by each of the defendants
17 to defraud the WLCC to issue bonds based upon false and
18 misleading representations and to fraudulently cause clients of
19 Atlantic and Hughes to buy certain of those bonds, thereby
20 defrauding those clients as well. The indictment also alleges
21 that the defendants failed to invest the bond proceeds on the
22 WLCC's behalf in a manner agreed upon and, instead,
23 misappropriated the bond proceeds for their own use.

24 So I just disagree with you. I'm happy, again, as I
25 said, to go through them. There are certain paragraphs that we

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1 could make particular tweaks to, if you thought it was
2 important to do so, and I'll, of course, talk about the loss
3 amount and the various enhancements that you're objecting to,
4 and I'm happy to hear you out further if you'd like to be
5 heard.

6 MR. SCHWARTZ: Sure.

7 I can see your Honor has expressed a view, but just to
8 say the last word on this subject: I think the government, as
9 we know, must charge the offense conduct in the indictment in
10 the conjunctive with "ands," and the jury is entitled to
11 convict in the disjunctive, "ors," so it does not follow that
12 just because all of that language was in the indictment or was
13 described by you as the scheme, that the jury necessarily found
14 Mr. Archer guilty of every aspect of the scheme. And I think
15 when you've looked at the sentencing of some of the other
16 defendants, your Honor has accepted that they weren't
17 necessarily involved in every aspect of the scheme. I'm
18 thinking about Michelle Morton, for example.

19 THE COURT: And I don't think I necessarily need to
20 find that he was involved in every aspect of the scheme, but I
21 do think that I need to find that he had the requisite intent
22 to engage in these particular crimes.

23 MR. SCHWARTZ: Well, if your Honor feels that way, my
24 request would be that you make clear that you are finding that,
25 assuming this is true, because you are bound to do so in light

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1 of the Second Circuit's ruling, and your independent view of
2 the evidence continues to be as it was in your prior opinion,
3 and as I alluded to before, I think it would be useful, if it
4 is something your Honor has thought about, to indicate that,
5 now understanding the Second Circuit's standard, that the
6 evidence not only preponderated in favor of a new trial and
7 against Mr. Archer's specific intent with respect to those
8 items, but preponderated heavily, nonetheless, you are bound.

9 THE COURT: Does the government want to be heard?

10 MS. MERMELSTEIN: Sure, your Honor.

11 I think for the reasons your Honor has said, I don't
12 think that the decision granting the Rule 33 can replace the
13 factual findings of the PSR. And while I agree that your Honor
14 need not accept everything that the Second Circuit found the
15 jury could have accepted, there is some daylight there, I
16 think, I think we're also not drawing on a blank slate here.
17 And I think, first, with respect to what Mr. Schwartz just
18 said, the Second Circuit has already found that using the
19 clarified standard, the evidence here did not preponderate
20 heavily against the verdict.

21 THE COURT: That, I think, is clearly done. I think
22 the lapping was there's only one clear result or something to
23 that effect, but please proceed.

24 MS. MERMELSTEIN: I think that's right.

25 I also think that the Court now, in making factual

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1 findings, cannot, in addition to that overarching starting
2 point -- there are certain things the Second Circuit has said
3 that I think are now functionally decided, and so if you look
4 at the language of the Second Circuit's decision closely, in
5 some cases, the circuit said something was not supported by the
6 record or was not a reasonable inference with respect to the
7 Rule 33 decision. In other cases, it was, I think, more
8 agnostic on what the jury might have -- on what its view of the
9 right view was, but said sort of the jury was entitled to go
10 this way even if it also could have been entitled to go another
11 way, and there, there may be some daylight, but there's a fair
12 amount of language where the Second Circuit says, for example,
13 taken as a whole, the emails provided strong support for the
14 jury to find that Archer knew the bond proceeds were being
15 misappropriated or the evidence strongly supported an inference
16 that he intended to help the conspirators fraud Hughes' and
17 Atlantic's clients by purchasing the bonds without informing
18 them of conflicts of interest that riddled the transactions.

19 There was persuasive evidence that Archer, when he
20 made the first interest payment, or assisted in doing so,
21 intended to delay discovery of the scheme or that his
22 perpetuation of the Calvert story was evidence that he was
23 lying about it because he understood the nature of the fraud.

24 That language, that there's a strong inference that
25 there's persuasive evidence, I think, is functionally a finding

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1 that there was a preponderance of evidence in favor of those
2 findings. It's hard to -- if a preponderance is 51 percent,
3 then these things seem to be a determination that at least as
4 to these facts, there was a preponderance of the evidence. And
5 so for purposes of sentencing where that's the standard, I
6 think those issues really can't be relitigated.

7 I think, to be clear, I don't think your Honor has to
8 adopt the entire Second Circuit's decision as the facts here.
9 I think there's room to say there's a difference of opinion,
10 but I think those core facts really can't be disputed at this
11 stage of the litigation.

12 THE COURT: All right.

13 Mr. Schwartz?

14 MR. SCHWARTZ: So I think that there are two issues
15 here.

16 One is what role, if any, the Second Circuit's
17 decision has in your fact-finding; the other is the jury
18 verdict.

19 I think with respect to what the government just
20 talked about and, quote-unquote, fact-finding in the Second
21 Circuit's decision, I think that has nothing to do with what
22 we're doing here today. It is very clear that the Second
23 Circuit was looking at the trial record through a particular
24 lens, and it was the lens of the standard that they clarified
25 for Rule 33 relief and whether the evidence preponderates

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1 heavily in favor of innocence such that whatever it was that
2 they articulated the standard was at the time. Any discussion
3 of the facts that they engaged in in that context have to be
4 viewed against that standard of review and can't be viewed as
5 fact-finding or determinative of fact-finding for sentencing,
6 and I think it would be grossly unfair to Mr. Archer to assume
7 that you are bound by any of the, quote-unquote, fact-finding
8 by the Second Circuit, because they were applying a much more
9 stringent standard of review than the preponderance of the
10 evidence fact-finding that we're doing at sentencing here.

11 Now, the effect, however, of the Second Circuit's
12 decision was to reinstate the jury verdict. And, of course,
13 you're correct that the jury verdict carries certain
14 implications for sentencing – you know, first and foremost,
15 that we're having one – but it has never been the law that a
16 jury's conviction on a substantive scheme or conspiracy count
17 sweeps up, for sentencing purposes, all of, for example, the
18 aims of the conspiracy as your Honor instructed to the jury.

19 I just cite to you again what we pointed to in our
20 submission – this is at page 4 of our reply – noting that to
21 obtain a conviction for conspiracy, the government must
22 demonstrate that the accused had some knowledge of the unlawful
23 aims of the conspiracy, but it is not necessary to demonstrate
24 that the accused knew and therefore reasonably anticipated all
25 of the unlawful aims of the scheme charged. That's from *United*

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1 *States v. Perrone*, 936 F.2d 1403 at 1416.

2 So, again, I think for sentencing purposes, the only
3 thing that you are bound by is the jury's verdict that there
4 was sufficient evidence to convict on the elements of the
5 crime. And the relevant element of conspiracy is willfully
6 joining the conspiracy with knowledge of some of its aims, and
7 with respect to fraud, the specific intent to defraud. But
8 that doesn't entail any particular way in which the jury found
9 facts in reaching its verdict. It doesn't entail that all of,
10 for example, the pension funds were victims, as opposed to the
11 WLCC being the only victim of the crime. It doesn't entail
12 understanding that Jason Galanis was misappropriating or
13 stealing the proceeds of the bonds as opposed to exposing the
14 issuer to the risk of loss because there were misstatements
15 about the bonds. Any of those are things that the government
16 argued to the jury actually happened, and that all the
17 defendants, but this defendant, in particular, were actually
18 responsible for and made them guilty of the crime. And if the
19 jury was unanimous on, for example, the regulatory capital
20 theory that I gave you before, they could have convicted, and
21 that would have been sufficient for those purposes and would
22 not have entailed any of the other fact-finding that you're
23 talking about.

24 So I feel very strongly that if we are looking at the
25 jury's verdict, the only thing that you are bound by is the

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1 jury's finding with respect to the elements of the crime, and,
2 given the way the evidence came in, there were ample ways in
3 which the jury could have convicted that don't entail
4 Mr. Archer's specific intent as to the larger scheme that Jason
5 Galanis was perpetrating, or even that aspects of it were
6 reasonably foreseeable to him, in particular, the fraud on the
7 clients of Atlantic and Hughes and the loss of tens of millions
8 of dollars to those pension funds.

9 MS. MERMELSTEIN: I'll say one other thing, your
10 Honor.

11 I don't disagree with Mr. Schwartz that in the
12 abstract, following the jury verdict, the Court can fact-find
13 and is limited only by the nature of the elements. I think
14 we're not there here, both for the reasons I've said with
15 respect to the Second Circuit's decision, but even leaving
16 aside the extent to which the language in that decision saying
17 that things were well-established is controlling, I think
18 Mr. Schwartz's idea that there is some other fraud on the BIT
19 Board or on Morgan Stanley is clearly not the charged crime,
20 and so when you think about -- when you work backwards from the
21 first principle here, which is that Mr. Archer stands convicted
22 of the charged crime with its two prongs -- the investment
23 advisor piece and the misappropriation piece -- and you then
24 view the evidence in light of the fact that he is, in fact,
25 guilty and had the requisite intent, the inferences from all of

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1 that evidence – the participation, the facially bizarre nature
2 of the \$15 million transaction, the updates from Jason Galanis
3 to Mr. Archer all throughout, and the fact that those are
4 identical virtually to the updates to Mr. Cooney, who also
5 stands convicted – in the lens of guilt, the meaning of those
6 facts take on a more clear direction.

7 So even in the absence of the Second Circuit's
8 language – and I think we need not decide the extent to which
9 that limits the discretion – when you look back at the evidence
10 through the lens of guilt, I think it is clear that Mr. Archer
11 knew, and it was reasonably foreseeable to him, both prongs of
12 the fraud, and that the findings then need to proceed from
13 there, in which case, I think the PSR functionally stands as
14 is, and if there are particular tweaks, we're happy to talk
15 about them.

16 MR. SCHWARTZ: So I actually think now we're in
17 agreement that your Honor is free to engage in fact-finding on
18 sentencing, and the government is simply arguing what facts
19 that you should find. I'm happy to argue the other set of
20 facts, but, again, I think your Honor has already gone through
21 that process, looked at all the facts, and made findings by a
22 preponderance of the evidence in your 2018 opinion, and I go
23 back to where I started, which is: Consistent with guilt – and
24 the government seems to agree --

25 THE COURT: What I state in my opinion was not

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1 consistent with guilt, and I would be unfaithful to the jury's
2 verdict. I agree with you that I don't have to assume, and
3 will not assume, that he knew of everything that the government
4 alleged or everything that the circuit said, but I do have to
5 conclude that he had the requisite intent to commit this
6 conspiracy and this securities fraud, as it was defined to the
7 jury, including in the indictment.

8 So I am happy to talk about the presentence report,
9 but I think we need to start with that general premise,
10 because, otherwise, I don't think I'd be living up to my oath,
11 and I think I would be unfaithful to the jury verdict.

12 MR. SCHWARTZ: Well, I suppose the reason why I'm
13 hanging onto your opinion is, your Honor held that there was
14 sufficient evidence to convict under Rule 29, and it's not
15 clear from the decision exactly what evidence you're referring
16 to, and I, frankly, read the opinion the way you just
17 articulated it, which is that it was not consistent with guilt
18 at all, but somewhere your Honor --

19 THE COURT: When I say it was not consistent with
20 guilt, I stand by what I said in my opinion in terms of, I
21 couldn't say that a reasonable jury couldn't conclude what it
22 did, but I had the reservations that I expressed. The circuit
23 has since clarified the standard under Rule 33. I need to make
24 factual findings today by a preponderance of the evidence, but
25 they need to be consistent with the facts implicit in the

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1 jury's verdict. And I don't think the theory you've proposed
2 to me is consistent with the jury's verdict. The theory of
3 guilt that you have proposed, I don't believe is consistent
4 with the jury's verdict.

5 MR. SCHWARTZ: Can I ask why not?

6 THE COURT: For the reason that I just said a moment
7 ago -- about how the fraud was framed and articulated to the
8 jury at every stage of the case, including in the indictment
9 that was read to them.

10 MR. SCHWARTZ: That puts us in an interesting
11 position, right, because the jury convicted, and that
12 conviction is valid for today's purposes. There were aspects
13 of the scheme, as was charged, that your Honor held not only
14 that there was insufficient evidence, but that there was no
15 evidence.

16 For example, the government argued that Mr. Archer
17 understood that the \$15 million that was received into the RSB
18 account to purchase the second tranche of bonds was recycled
19 proceeds from the first charge. Your Honor held, at page 24,
20 that there was no evidence that Archer was aware that that
21 money was -- that the money provided by Jason Galanis
22 constituted proceeds.

23 So I take the point about needing to be faithful to
24 your oath, but you also need to be faithful to the evidence.
25 And if there is a world in which the jury could have convicted

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1 Mr. Archer that is also consistent with your fact-finding in
2 that decision, I think that's where both your fact-finding and
3 your oath ought to lead us. And while the theory that I
4 articulated certainly was not the central thesis of the
5 government, these were arguments that the government made --
6 particularly with respect to Morgan Stanley, they were
7 arguments that the government made to the jury that they said
8 were sufficient to convict him of conspiracy and securities
9 fraud, and I think we ought to take the government at its word
10 when it made those arguments. It is not necessary to embrace
11 every aspect of the way the government charged the case, and
12 some of it is simply not supported by the evidence at all, as
13 your Honor has already found.

14 So I think we have to respect the jury's verdict for
15 today's proceedings, but we don't have to guess at what the
16 jury found or probably found. Under the law, as you explained
17 it at the top, we have to accept, for today's purposes, the
18 facts that the jury necessarily found. And the only thing that
19 they necessarily found was that Mr. Archer joined a conspiracy
20 and that he engaged in a substantive fraud, not that he did it
21 in any particular way and, certainly, not that he did it in the
22 very specific way argued by the government and laid out in the
23 PSR.

24 THE COURT: I think I have already responded to your
25 point. I understand them. I have no doubt the circuit will be

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1 in a position to hear this again.

2 I'm not going to -- if that's your approach to the
3 PSR, we don't need to wordsmith particular paragraphs unless
4 you wanted to. I will add in, as I said, the language about
5 him maintaining his innocence, some procedural history. If
6 anyone wants to talk about the exact language, we can, but if
7 you trust me to do that, I'll add that in.

8 MR. SCHWARTZ: I think that's fine.

9 I would ask, again, that your Honor basically
10 incorporate your part of this discussion into the PSR, which is
11 to say, you are adopting those portions because you feel
12 constrained to, but that your review of the evidence is still
13 consistent with what you wrote in November 2018. That, at
14 least, preserves these issues for us.

15 THE COURT: I think the theory of the case as
16 presented in the PSR is what is consistent with the jury's
17 verdict, and that for the same reason that I denied the Rule 29
18 motion, there was ample evidence to allow a jury to find as it
19 did.

20 So I am adopting the PSR. Again, there are one or two
21 places that I think we can wordsmith, but I'm adopting the
22 characterization of the fraud as presented in the PSR. I think
23 there is sufficient evidence in the record accepting the facts
24 implicit in the jury's verdict for me to find, by a
25 preponderance of the evidence, that that is how I determine

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1 loss amount and the number of victims, and I'm happy to walk
2 through it a little bit more now.

3 Again, unless you want to go through one or two
4 particular sentences, I'm going to adopt the findings in the
5 presentence report. I'll just tell you what I was going to
6 change, but it was not the bulk of it in the way that you're
7 requesting.

8 As I said already, after paragraph 7 on page 5, I was
9 going to add in some procedural history and indicate that the
10 Court denied Mr. Archer's motion for a judgment of acquittal,
11 but granted his Rule 33 motion. I was going to indicate what
12 the circuit did in response. I was going to have a footnote,
13 as I believe you had requested, after paragraph 33, indicating
14 that Mr. Archer has maintained his innocence throughout and
15 disputes that he was a knowing participant in the conspiracy
16 and contests many of the facts contained herein.

17 In paragraph 43, about the control of Atlantic and
18 Hughes, I was going to change the second sentence slightly to
19 read: Jason Galanis did so together with Archer, Dunkerley,
20 Cooney, among others, by providing Morton with financing to
21 purchase the investment advisors.

22 I was going to make a minor alteration to
23 paragraph 54, in the second line, and say: For example, Archer
24 provided \$2.6 million of bonds to another entity, which then
25 transferred them to the placement agent.

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1 And there is one sentence I was going to take out at
2 paragraph 65 about Jason's Galanis informing Archer that
3 Galanis intended to use the bond proceeds to purchase his
4 TriBeCa mansion, which Galanis subsequently did.

5 But I was going to overrule, and I am overruling, your
6 other objections.

7 So the presentence report will be made part of the
8 record in this matter and placed under seal. If an appeal is
9 taken, counsel on appeal may have access to the sealed report
10 without further application to the Court.

11 We've been talking, in part, about how these facts
12 affect the guidelines. As you all know, the sentencing
13 guidelines are a set of rules published by the United States
14 Sentencing Commission. They're designed to guide judges when
15 they impose sentence. Although at one time they were
16 mandatory, meaning judges were required to follow them, they're
17 no longer binding, but judges must nonetheless consider them in
18 determining an appropriate sentence and must, thus, ensure that
19 they have properly computed the guideline range.

20 Are you still pursuing your objection to the use of
21 2B1.1 with respect to the conspiracy?

22 MR. SCHWARTZ: I don't think it makes a practical
23 difference. It is not correct, but 2B1.1 will be the correct
24 guideline for the substantive securities fraud, and they will
25 be grouped.

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1 THE COURT: I just want to note that the 2X1.1 only
2 applies when one has been convicted of a conspiracy and his or
3 her specific offense is not covered by another guideline
4 section. So, in this case, Mr. Archer was both convicted of
5 conspiracy and the specific substance offense of securities
6 fraud, for which the applicable guidelines is 2B1.1.

7 Does the government disagree with that?

8 MS. MERMELSTEIN: No. I think it's academic here.

9 THE COURT: Okay.

10 I'm going to, therefore, evaluate the enhancements to
11 Mr. Archer's sentence under the typical preponderance of the
12 evidence standard.

13 As to loss amount, there's no dispute that the actual
14 losses to the victims exceeded \$25 million.

15 Under the guidelines, Mr. Archer is responsible for
16 pecuniary harm that he knew or, under the circumstances,
17 reasonably should have known was a potential result of the
18 offense.

19 In addition to his own conduct, he's also responsible
20 for all acts and omissions of others that were (1) within the
21 scope of the jointly undertaken criminal activity; (2) in
22 furtherance of that criminal activity; and (3) reasonably
23 foreseeable in connection with that criminal activity.

24 Mr. Archer argues that no loss amount was reasonably
25 foreseeable to him. He further contends that the Court could

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1 conclude for sentencing purposes that the evidence was
2 sufficient to show that he participated in a scheme to defraud,
3 but insufficient to show that he could reasonably foresee any
4 loss to any victims.

5 I disagree. As I said earlier, the jury convicted
6 Mr. Archer not just of any scheme to defraud, but the
7 particular scheme to defraud alleged here; in other words,
8 given that the jury found him guilty of these charged crimes,
9 as alleged in the indictment, I have to accept that he had the
10 requisite intent to commit those crimes, and in doing so, I
11 believe I must also accept that he knew that the investment
12 advisor clients were being defrauded and that the tribal bond
13 proceeds were being misappropriated. And I do so by a
14 preponderance of the evidence, which leads me to believe that
15 the entire \$43 million in losses was reasonably foreseeable to
16 him.

17 I'm going to quote a little bit from the circuit's
18 opinion, but I agree – and I think we all agree – that I'm not
19 bound by the facts as the circuit characterized them, but they
20 referred to "a wealth of emails in which Archer, Cooney, and
21 Galanis discussed the progression of the Wakpamni scheme," and
22 what I'll say – I'm no longer quoting – is that those emails go
23 back to early 2014 in the communications, and I'm quoting again
24 now from the circuit, "Galanis ensured that Archer stayed up to
25 date on the deal with the Wakpamni, including by informing

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1 Archer that the proceeds from the sale of the bonds were
2 supposed to be placed into an annuity."

3 Other emails sent to Archer did keep him informed
4 about the progress of the Hughes and Atlantic acquisitions and
5 specifically referenced the possibility of placing the Wakpamni
6 bonds with them. For example, in one email, Galanis told
7 Archer that he believed Hughes would take 28 million of the
8 bonds, which is what transpired after the first bond issuance.

9 There was also evidence introduced at trial to the
10 effect that Mr. Archer personally purchased \$15 million worth
11 of bonds in the second issuance using money given to him by
12 Jason Galanis, made representations to the WLCC that he was
13 purchasing the bonds "for his own account and for investment
14 only," transferred them to another entity controlled by his
15 codefendants, made false statements about the source of the
16 money to Morgan Stanley and Deutsche Bank, and stated that
17 Calvert was the "lender and beneficial owner" of the bonds from
18 the second offering. Later on, he also misled the BIT Board as
19 to Galanis's involvement with the Burnham companies.

20 Thus, accepting the factual findings I believe were
21 implicit in the jury's verdict, there is sufficient evidence to
22 establish by a preponderance of the evidence that Mr. Archer
23 got involved with the WLCC scheme from the start and either did
24 foresee, or reasonably should have foreseen, the entire amount
25 of the losses from the scheme, thus, I find that a 22-level

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enhancement is appropriate.

I also find that the ten or more victims enhancement is appropriate. Mr. Archer urges me to find that he was unaware that the clients of Atlantic and Hughes would be defrauded, but, again, I must assume his knowledge of the objects of the conspiracy in order to be faithful to the jury verdict. Given the involvement of ten pension funds and the WLCC, a two-level increase is appropriate.

The parties agree that a two-level minor-role reduction is warranted, and I do as well. Even assuming that Mr. Archer played an important role in the fraudulent scheme, as made clear by Amendment 794 to the sentencing guidelines, "relatively culpability" is now to be assessed "only by reference to one's co-participants in the case at hand" and not as the Second Circuit had previously held, "as compared to the average participant in such a crime." Here, I believe that Mr. Archer is substantially less culpable than the average participant in the criminal activity at issue, and there's no doubt that the loss amount greatly exceeded his personal gain.

As I said at Bevan Cooney's sentencing, it's undisputed that Jason Galanis was the mastermind behind and orchestrator of the fraud. As for John Galanis, he induced the Wakpamni tribe to issue its bonds in the first place, something which was undoubtedly at the heart of the fraudulent scheme. Hugh Dunkerley served as the placement agent for the tribal

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1 bond issuances and as the sole managing member of the WAPC,
2 roles which were pivotal in misappropriating the bond proceeds.
3 And Michelle Morton and Gary Hirst, as investment advisors,
4 caused client funds to be invested in the WLCC bonds without
5 disclosing conflicts of interest.

6 I thus find that a two-level minor-role reduction is
7 warranted here. Again, the government doesn't disagree.

8 I don't agree with Mr. Archer that a four-level
9 minimal role reduction is applicable. A minimal role
10 participant is defined as a defendant whose lack of knowledge
11 or understanding of the scope and structure of the enterprise
12 and of the activities of others is indicative of a role as a
13 minor participant, but this enhancement is inapplicable, in my
14 view, for the reasons I already stated regarding the proof of
15 Mr. Archer's knowledge.

16 Accordingly, I find that his offense level is 31, his
17 criminal history category is I, and his recommended guideline
18 sentence is 108 to 135 months in prison.

19 As I said earlier, that range is only advisory.
20 Courts may impose a sentence outside of that range based on one
21 of two legal concepts – a departure or a variance.

22 A departure allows for a sentence outside the advisory
23 range based on some provision of the guidelines themselves. I
24 understand that Mr. Archer is making motions for departures
25 based on aberrant behavior and the offense level overstating

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1 the seriousness of the offense.

2 Is that right, Mr. Schwartz?

3 MR. SCHWARTZ: That's correct.

4 THE COURT: Okay.

5 I'm going to deny those motions, although I'm going to
6 consider the substance of the arguments when evaluating the
7 3553(a) factors.

8 With respect to aberrant behavior, a court may depart
9 downward for aberrant behavior only if a defendant committed a
10 single criminal occurrence or a single criminal transaction
11 that (1) was committed without significant planning; (2) was of
12 limited duration; and (3) represents a marked deviation by the
13 defendant from an otherwise law-abiding life.

14 Application Note 2 to 5K2.20 notes that a departure
15 for aberrant behavior in a fraud case is generally not
16 available because such a scheme usually involves repetitive
17 acts rather than a single occurrence or a single criminal
18 transaction and significant planning. In the *Barber* case, 132
19 F. App'x at 895, the Second Circuit held that an aberrant
20 behavior departure was unwarranted where the defendants' fraud
21 offenses "required sophisticated financial forethought, were
22 not of limited duration and involved significant planning." I
23 find here, similarly, that a departure from aberrant behavior
24 is not warranted. This was a complex scheme that was carried
25 out over at least two years, and Mr. Archer's actions,

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1 accepting the facts implicit in the jury's verdict, required
2 significant financial forethought and planning.

3 I also find that a downward departure is not warranted
4 on the basis that the offense level substantially overstates
5 the seriousness of the offense per Application Note 21(C) to
6 2B1.1. This is not the kind of exceptional securities fraud
7 case contemplated by the guidelines in which a fraud produces
8 an aggregate loss amount that is substantial but diffuse, with
9 relatively small loss amounts suffered by a relatively large
10 number of victims. As I said, I will, though, consider this
11 argument in assessing the 3553(a) factors.

12 In short, I've considered whether there is an
13 appropriate basis for departure from the advisory range within
14 the guideline system and conclude that no grounds exist, but I
15 also, of course, can impose a nonguideline sentence based on
16 what we call a variance, which is what I've been talking about
17 pursuant to 18, United States Code, Section 3553(a).

18 Would the government like to be heard with respect to
19 sentencing?

20 MS. MERMELSTEIN: Yes, your Honor.

21 There's really no question here that this was a
22 serious and large-scale offense. And I think that in thinking
23 about what the right sentence is for this defendant, the two
24 most serious considerations are really just punishment and
25 respect for the law.

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1 With respect to just punishment: A very heavy
2 consideration is the need to avoid unwarranted sentencing
3 disparities as we've said in our submission. Archer played
4 virtually an identical role to Mr. Cooney. There are, of
5 course, small ways in which they can be distinguished –
6 Mr. Archer bought three times as many bonds, for example – but
7 in almost every respect, they functioned in parallel, they did
8 the same things, they were apprised of the same things, they
9 acted in the same way, and Mr. Cooney received a sentence of
10 30 months.

11 I think it would be manifestly unjust for Mr. Archer
12 to receive a nonincarceratory sentence after the sentence
13 imposed on Mr. Cooney. I understand the arguments Mr. Archer
14 has made about his personal life and circumstances, and those
15 are, of course, things that the Court can consider, but
16 Mr. Cooney had similar arguments that he made, and even
17 assuming the Court found some daylight there, it cannot justify
18 the enormous swing between two defendants who did functionally
19 the same thing.

20 I think that it's worth noting here that Mr. Archer is
21 not a person, as we sometimes see in financial cases, who acted
22 out of some desperate need for money. He obviously is a person
23 who has lived, in almost every way, a privileged life. So
24 there's no justification for the conduct in that respect, and I
25 think it would send a very dangerous and damaging message with

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1 respect to general deterrence and respect for the law to treat
2 someone differently, to allow someone not to face consequences
3 solely on those bases. It would send the message that someone
4 who is privileged or connected is facing a different system of
5 justice, and that would be wrong.

6 Given the nature of the scheme here, I understand the
7 complexity of your Honor's differing view on this, but given
8 the conviction and the jury's verdict and the Second Circuit's
9 decision and the sentences imposed on the other defendants in
10 the case, I think an incarceratory sentence is warranted and
11 necessary. So for the reasons we've set forth in our
12 submission, we think that sentence is appropriately 30 months.

13 THE COURT: Thank you.

14 Mr. Schwartz, would you like to be heard?

15 MR. SCHWARTZ: Yes. Thank you.

16 This is certainly an unusual situation. We're here
17 for the sentencing of a defendant whom the jury convicted, whom
18 your Honor had serious, and I presume still has serious,
19 questions about whether he was factually innocent, and whom the
20 Second Circuit reversed and sent us back here, and those
21 findings and the jury's verdict have taken on what appears to
22 be an outsized role as compared to an ordinary sentencing,
23 where I think that we would look at the sentencing facts
24 afresh. We're not here. That's fine --

25 THE COURT: But I always have to consider the nature

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1 and circumstances of the offense. It's always core to
2 sentencing.

3 MR. SCHWARTZ: For sure, for sure.

4 But you would look at the offense as charged, as
5 convicted, and then you would look at your Honor's independent
6 view of the evidence as to what, particularly in a scheme or
7 conspiracy case, an individual defendant was personally
8 responsible for.

9 Here, everything that your Honor just held was
10 prefaced with the words -- some version of the words "assuming
11 the facts necessarily found by the jury," and we have a
12 difference as to what that is, and that makes this strange, is
13 all I am saying.

14 But the government has not pointed to anything that
15 Mr. Archer has done that makes him worthy of the sort of
16 punishment that it's seeking. Instead, it's trying to compare
17 him to other people, and I think, putting aside those other
18 things, it's very clear that Mr. Archer played a fundamentally
19 different role -- we would say he was used -- he played a
20 fundamentally different role in this scheme than even
21 Mr. Cooney, who they want to compare him to. Mr. Cooney was
22 sentenced to 30 months in prison, and they say that's an
23 appropriate benchmark, but let's just look at some of the
24 critical differences between them.

25 Just to point to three what I think are enormous

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1 factual differences between them as to even crediting
2 everything we're saying was implicit in the jury's verdict are
3 plainly different:

4 Number one, Mr. Cooney profited from the scheme and
5 received money directly from the fake Wakpamni account.
6 Mr. Archer did not. He lost money in the account.

7 Number two, Mr. Cooney falsified documents relating to
8 Calvert as part of the coverup and then submitted those
9 documents to the SEC to obstruct its investigation, which led,
10 I believe, your Honor to give him an obstruction enhancement at
11 sentencing. Mr. Archer didn't do any of that. There is one --
12 actually two emails where he used the word "Calvert." There's
13 no indication that he understood what it was or that he was
14 trying to cover anything up as opposed to just repeating a word
15 that Jason Galanis had said to him. The government has not
16 asked for an obstruction enhancement, nor would one possibly be
17 appropriate. That alone is a basis to distinguish them for
18 respect for the law and general deterrence purposes.

19 And number three is, just between those two men, look
20 at the way that they interacted with and dealt with one
21 another. Your Honor will recall the recording that was put
22 into evidence of Bevan Cooney talking about Mr. Archer, talking
23 about how he was going to be used, his communications with
24 Jason Galanis where Jason Galanis told Bevan Cooney to take it
25 slow with Mr. Archer or else he would just have to pimp him

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1 out. They were, even in a world in which Mr. Archer knew what
2 was going on, plainly using him. They were using him for his
3 connections, they were using him for his reputation, they were
4 using him for his name, they were using him for his good
5 credit.

6 Mr. Archer played a fundamentally different role in
7 this scheme, even crediting everything that we're talking
8 about, than Mr. Cooney did, and it would actually offend the
9 notion of just punishment and trying to avoid sentencing
10 disparities to sentence them anywhere close to one another
11 because they are not, even in this view, close to equally
12 responsible for the fraud.

13 Now, all that being said, the purpose of sentencing is
14 not just to look at the offense, but also to look at the entire
15 person. And Mr. Cooney and Mr. Archer are also totally
16 different people, and I'm not going to speak to him as a
17 person, but I will speak to Mr. Archer.

18 Mr. Archer is someone who spent the early years of his
19 life working incredibly hard to build businesses, successfully
20 to build businesses, and that all came crashing down when this
21 case was charged, and he bears some responsibility for that,
22 for sure. In the almost six years since that has happened, he
23 has put his head down, and he has dedicated himself equally to
24 his friends, family, and community, and you see that in the
25 outpouring of support that you get from his immediate family,

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1 from his extended family, from the people he works with, from
2 the members of his community, from the parents of the kids that
3 he coaches in the community lacrosse league, from all of the
4 people that he has selflessly helped over the years, whether
5 with his time or with his money or with anything else.

6 Mr. Archer has lived under this court's supervision
7 for almost six years. He has a spotless record. He is a
8 person who is loved and supported by his family and community,
9 as you see by the folks not only who submitted letters, but who
10 have taken the time to come here today.

11 All of those things must be balanced against the
12 offense that, for today's purposes, we assume that he
13 committed. And whether that technically qualifies for an
14 aberrant behavior departure, it is plain that the offense
15 conduct was aberrant, that it is not like anything he's ever
16 done or been accused of doing any other time in his life, and
17 it's very clear why it happened. It happened, whether
18 knowingly or not, because he came under the influence of a
19 person that he trusted far too much and didn't ask nearly
20 enough questions of.

21 He has and his family has and his friends have
22 suffered incredibly already as a result of that association.

23 While no one would say that being on pretrial
24 supervision for six years is the same as being sentenced to
25 jail, it is a material impact on a person's liberty, on their

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1 ability to live their lives, on their ability to earn a living
2 and provide for their family, and Mr. Archer has been doing
3 that for the last six years, he's been doing it without
4 complaint.

5 I respectfully submit – and I, of course, want you to
6 hear from Mr. Archer himself – I respectfully submit that no
7 purpose – no purpose articulated by the government and no other
8 purpose – would possibly be served by taking this man out of
9 the community, by taking him away from his three children, the
10 oldest of whom is 14, by taking him away from his wife, who has
11 had to become the primary bread earner for the family, by
12 taking him away from the many children that he coaches in his
13 community, by taking him away from the family that he supports,
14 again, not only through his work, but through his time. The
15 daughter that he drives to and from school every day and spends
16 countless hours with because of her needs, the other children
17 that he devotes so much time to, no purpose, no legitimate
18 purpose of sentencing would be served by taking him away from
19 those people.

20 If anything, the way to serve the purposes of
21 sentencing are to require him to do more, to sentence him to
22 probation, and to require him to give more to his community.
23 Those things would both allow him to be a productive member of
24 his community, as he has been, not inflict more collateral
25 horrific consequences on his family and his community, and

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1 demonstrate the appropriate level of punishment for his conduct
2 and himself as a person in comparison to both the other
3 individuals involved in this case and on its own terms.

4 Thank you.

5 THE COURT: Thank you.

6 Mr. Archer, I read your letter, but would you like to
7 be heard today?

8 THE DEFENDANT: Yes, your Honor.

9 THE COURT: Just bring the microphone a little closer,
10 please.

11 THE DEFENDANT: I'm reading my words.

12 The position I found myself in here is nothing less
13 than surreal. I've been sentenced for a crime I was not
14 knowingly a part of, but I now understand was used by Jason
15 Galanis and others to help commit the fraud. And I have deep
16 remorse for the victims of the crime, the pension funds, the
17 Wakpamni tribe, as well as other people who were injured by
18 Jason Galanis's scheme, not to mention the numerous Burnham
19 employees that needlessly lost their jobs.

20 Of course, I'm most sorry for my family, for what I
21 put them through, and the dreams we haven't realized. I want
22 you to understand even though I did not commit this crime, I've
23 learned many lessons through the experience. I was doing too
24 many things at once, probably not paying enough attention to
25 any one of them.

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1 All the business deals I was involved with, I probably
2 concentrated too much due diligence on the overseas activities
3 and trusted the people involved in this deal too much because
4 of their pedigree and reputation.

5 I have learned a lesson in the hardest way possible
6 that you cannot outsource any critical decision-making and that
7 people are not always what they seem.

8 I've also learned an important lesson about the people
9 in my life. Regardless of what your Honor decides today, I
10 have a more loving family than most and equally supportive
11 friends, which I attribute to be very exceptionally blessed and
12 very lucky. Those people have stood with me throughout this
13 process, and I'm sustained by their love. Corrupt actors in
14 our business world and politics, coupled with vicious media,
15 have no chance against the kind of love and support I have, and
16 they will not shape my narrative.

17 I do not think there is much more to say here that I
18 haven't already told you in my very personal letter. I just
19 hope that these words fall on receptive ears and a
20 compassionate heart.

21 I just ask you that you do not separate me from my
22 young family and allow me to continue to try to do good with my
23 children and my community.

24 THE COURT: Thank you.

25 Is there any reason why sentence cannot be imposed at

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1 this time?

2 MS. MERMELSTEIN: No, your Honor.

3 MR. SCHWARTZ: No, your Honor.

4 THE COURT: I'm required to consider the advisory
5 guidelines range as well as the factors outlined in the
6 provision of the federal law I've mentioned a couple times, 18,
7 United States Code, Section 3553(a), and I have done so.

8 There's no dispute about the harm this fraud caused to
9 real people. One of the poorest Native American tribes in the
10 country, as well as the clients of Hughes and Atlantic pension
11 funds held for the benefit of transit workers, longshoremen,
12 housing authority workers, and city employees, among others. A
13 substantial sentence must, thus, be imposed to reflect the
14 seriousness of the offense, promote respect for the law,
15 provide just punishment, and afford adequate deterrence to
16 others who may seek to engage in similar criminal conduct.

17 Many judges have noted the inordinate emphasis that
18 the sentencing guidelines place in fraud cases on the amount of
19 actual or intended financial loss, and that's a quote from the
20 *Adelson* case, 441 F. Supp. at 509, which can oftentimes lead to
21 unreasonable and unfair sentences. In such cases, judges have
22 varied downward pursuant to the rule 3553(a) factors to arrive
23 at a more just and reasonable sentence. See, e.g. *Johnson*,
24 2018 WL 1997975, at *4. Such an approach is warranted here.

25 I have also considered the need, as the government, I

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1 think, rightly notes, to avoid unwarranted sentencing
2 disparities. I want to make clear, though, that the three
3 defendants who received the longest sentences in this case
4 received thousands or even millions of dollars in criminal
5 proceeds and were convicted of another separate fraud together
6 prior to this one. Mr. Archer, by contrast, lost money from
7 this scheme and has no criminal history.

8 The government argues that Mr. Archer's most akin in
9 terms of culpability to Bevan Cooney, whom I sentenced to
10 30 months in prison. Accepting that Archer had the requisite
11 intent, I generally agree. Like Mr. Archer, Mr. Cooney played
12 a relatively smaller role in the scheme compared to his
13 coconspirators, but, in some respects, as Mr. Archer notes, he
14 is distinguishable from Mr. Cooney as well.

15 Cooney received thousands of dollars in criminal
16 proceeds, less, for sure, than the millions others received in
17 this case, but Archer received none at all. Indeed, Archer
18 lost hundreds of thousands of dollars of his own money. And
19 while Mr. Cooney had a criminal history, Archer has none, and
20 Cooney, as noted, got an enhancement for obstruction of
21 justice, which the government isn't even seeking here.

22 Finally, I want to note that Mr. Cooney was sentenced
23 prior to the pandemic. Countless judges, including myself,
24 have given significantly reduced sentences since the pandemic
25 began, and have recognized that, as Judge Oetken put it in the

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1 Gonzalez case, prison time is much more punitive given
2 conditions that have been extraordinarily harsh. In his
3 estimate, incarceration now is essentially the equivalent of
4 either time and a half or two times that would ordinarily be
5 served. In *United States v. Saez*, Judge Engelmayer rightly
6 noted that beyond the risks to health, the pandemic has also
7 subjected all inmates to far more restrictive conditions of
8 confinement and has prompted limits on access to visitors,
9 including family, far beyond what would normally be the case.

10 Whether or not we can quantify how much harder it is
11 between the risks of COVID, the lockdowns, and the limitations
12 on healthcare, movement, and visitation, this is an important
13 factor to consider at sentencing, particularly for someone like
14 Mr. Archer, who does not present a danger to the community and
15 is unlikely to recidivate.

16 While it's true that the pandemic is starting to wane,
17 the conditions inside our prisons remain extraordinarily
18 difficult. In fact, the only defendant I have sentenced in
19 this case since the pandemic began is Michelle Morton, who
20 received a 15-month sentence, and she was not only convicted of
21 conspiracy to commit securities fraud, but investment advisor
22 fraud. In addition, Morton faced a higher guidelines range and
23 did not receive a minor-role reduction.

24 I have also considered, pursuant to 3553(a),
25 Mr. Archer's personal history and characteristics because each

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1 defendant must be considered individually as a person at
2 sentencing. As noted by the probation office in the
3 presentence report, he's led an otherwise law-abiding life for
4 the last 47 years, has been an active member of his community,
5 both in terms of volunteering his time and money, and has been
6 consistently employed throughout his adult life, and is, by all
7 accounts, a loving and devoted father to young children.

8 I've reviewed all 44 letters submitted on Mr. Archer's
9 behalf, which speak to what he's like as a person, parent,
10 friend, and community member. While letters from family
11 members and friends can be expected, I'll note that the sheer
12 number of letters from all aspects of life is somewhat unusual.
13 Among other things, they address his charitable endeavors,
14 including his work advocating and fundraising for veterans
15 struggling to reacclimate to civilian life, children in
16 poverty, victims of sex trafficking, and inner-city youth.

17 So I've considered all of that as well as the other
18 arguments the parties have made.

19 Ultimately, while I think the guidelines range is
20 simply too high, as is the government's recommendation, being
21 faithful to the jury's verdict, as I must, the crimes are just
22 too serious and the harm done too great to sanction a
23 nonincarceratory sentence here. In other words, a sentence
24 without any prison time is simply insufficient for someone who
25 knowingly committed this crime, which the jury concluded

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1 Mr. Archer did.

2 So, Mr. Archer, please rise for the imposition of
3 sentence.

4 It's the judgment of this Court that you be committed
5 to the custody of the Bureau of Prisons for a term of one year
6 and one day, to be followed by a term of supervised release of
7 one year on all counts to run concurrently.

8 I believe that this sentence is sufficient, but not
9 greater than necessary, to comply with the purposes of
10 sentencing set forth in the law.

11 You may be seated.

12 I'll also note that this is consistent with sentences
13 imposed by other judges from this district in financial fraud
14 cases with either similar guidelines range, roles, and/or loss
15 amount, including *U.S. v. Casper*, 19 CR 337; *U.S. v. Cervino*,
16 15 CR 171, and *U.S. v. Antoine*, 16 CR 763.

17 Now I'm going to impose financial penalties and inform
18 you of the conditions of your supervised release.

19 With respect to supervised release, it's going to be
20 for one year instead of three because you have been on release
21 for six years already.

22 All the standard conditions of supervised release
23 shall apply.

24 Mr. Schwartz, do you waive the public reading of the
25 standard mandatory conditions, or would you like me to read

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1 them out loud?

2 MR. SCHWARTZ: Not necessary, your Honor. We waive.

3 THE COURT: Okay.

4 So I'm going to impose mandatory special conditions of
5 supervised release. I am imposing the standard conditions
6 recommended by the probation department, as well given the
7 nature of the crime and the financial penalties that will
8 follow.

9 You must report to the probation office in the federal
10 judicial district where you're authorized to reside within 72
11 hours of release from imprisonment unless the probation office
12 instructs you to report to a different probation office.
13 Sorry, that was a standard condition.

14 You must provide the probation officer with access to
15 any requested financial information. You must not incur new
16 credit card charges or open additional lines of credit without
17 the approval of the probation office unless you're in
18 compliance with the installment payment schedule.

19 And you will be supervised in the district of your
20 residence.

21 Now we've got to talk about the financial penalties.

22 I am imposing the mandatory special assessment of
23 \$200, which must be paid immediately.

24 Mr. Schwartz, do you want to be heard with respect to
25 restitution and forfeiture? I mean, I'll tell you I was

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1 inclined to give the amount requested by the government for the
2 very reason we talked about earlier with respect to reasonable
3 foreseeability.

4 MR. SCHWARTZ: Well, I was going to say, I'll note my
5 objection, but I do understand that that reasoning essentially
6 compels the result that your Honor just discussed.

7 The proposed orders, we only received this morning. I
8 would like some time to look at them, particularly with respect
9 to the joint and several calculation of the forfeiture order,
10 which I understand the government has no objection to.

11 MS. MERMELSTEIN: That's fine, your Honor. I think
12 you have to impose the number, but we can sign the order with
13 the numbers later.

14 THE COURT: That's fine.

15 With no objection to restitution, other than the
16 objections that are implicit in the objection to this based on
17 the earlier arguments, restitution is ordered in the amount of
18 \$43,427,436. As noted, liability for restitution shall be
19 joint and several with that of all other defendants ordered to
20 make restitution for the offenses in this matter. The names,
21 addresses, and specific amounts owed each victim are outlined
22 on a schedule of victims page which will be filed under seal.

23 With respect to forfeiture, I am ordering forfeiture
24 in the amount of \$15,700,513 in funds.

25 Do you want me to rule on your objection with respect

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1 to forfeiture? I can read my ruling. I know you had made
2 objections and cited particular cases, and I'm happy to express
3 my rationale right now.

4 MR. SCHWARTZ: Yes. There was -- it becomes a little
5 academic in light of the restitution order, but there was a
6 separate objection to the forfeiture order with respect to the
7 bulk of funds that Mr. Archer never had control over.

8 THE COURT: I am imposing forfeiture in the amount I
9 just noted. I understand Mr. Archer's argument that no
10 forfeiture obligation is appropriate because while that 15-plus
11 million in funds passed through his accounts at some point, he
12 lacked control over them and does not possess them now. He
13 cites *Contorinis*, the *Contorinis* case, 692 F.3d at 147, in
14 which the Second Circuit held that insider trading proceeds
15 that were never possessed by the defendant which went directly
16 to an innocent third-party investment fund where the defendant
17 was a mere employee and small equity owner could not be subject
18 to forfeiture. He also cites the *Honeycutt* case, 137 S. Ct. at
19 1635, in which the Supreme Court held that a defendant who had
20 no ownership interest in the entity that received the money and
21 did not personally benefit could not be subject to forfeiture.

22 I agree with the government that these citations are
23 misplaced because, here, the funds went directly into the
24 Rosemont Seneca Bohai account, not a third-party entity, but an
25 entity which Archer controlled. In any event, *Contorinis* makes

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1 clear, and I believe Mr. Archer acknowledges, that a court may
2 order a defendant to forfeit proceeds received by others who
3 participated jointly in the crime provided the actions
4 generating those proceeds were reasonably foreseeable to the
5 defendant. Mr. Archer argues that it was not reasonably
6 foreseeable to him that Galanis was providing him proceeds of
7 the bond scheme, but, again, implicit in the jury's verdict was
8 the finding that Mr. Archer knew the proceeds of the bond
9 scheme were illicitly obtained.

10 Even if he didn't have control over those funds,
11 Galanis indisputably did. That Archer does not possess any
12 fraudulently proceeds now is also not relevant or determinative
13 here. A defendant may be ordered to forfeit "any property...
14 which constitutes or is derived from proceeds traceable to the
15 offense, whether kept by the defendant or shared with others,"
16 and that's a quote from the *United States v. Ohle* case, 441 F.
17 App'x 803.

18 I thus find that the funds in question were acquired
19 by Mr. Archer because they were controlled by him or his
20 coconspirators and find that an order of forfeiture in the
21 amount of \$15,700,513 is appropriate here.

22 In light of the very significant forfeiture and
23 restitution amounts, I decline to impose a fine.

24 I've already noted the special assessment.

25 So those are my rulings.

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1 Does either counsel know of any legal reason why this
2 sentence cannot be imposed other than the arguments already
3 made?

4 MS. MERMELSTEIN: No, your Honor.

5 MR. SCHWARTZ: No, your Honor, although I would ask,
6 for the record, whether your Honor has considered the
7 possibility, consistent with this sentence, of ordering
8 Mr. Archer to serve through intermittent incarceration so as to
9 minimally disruptive to his small children?

10 THE COURT: And what would you propose specifically?

11 MR. SCHWARTZ: So, in my experience, the Bureau of
12 Prisons typically administers that program, and it requires
13 some combination of nights and weekends in a facility.

14 THE COURT: But that's ultimately up to the Bureau of
15 Prisons?

16 MR. SCHWARTZ: No. Your Honor would have to -- if we
17 take a break, I'll point you to the provisions, but your Honor
18 would have to order the sentence to be served through
19 intermittent incarceration, and then they would administer it.

20 THE COURT: I don't think that's appropriate here.
21 I'm happy to make other recommendations, as I often do, but I
22 think that there are many defendants in criminal cases that
23 have familial obligations, and often it's the family members of
24 a criminal defendant who are hurt the most.

25 MR. SCHWARTZ: I do understand that. Just to be

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1 clear, I don't think a recommendation -- I don't think the
2 Bureau of Prisons could do anything with a recommendation. I
3 think it would have to be part of the sentence.

4 THE COURT: Okay.

5 MR. SCHWARTZ: But if your Honor is declining to do
6 that, obviously, that is within your --

7 THE COURT: Are there any other recommendations that
8 you're asking I make in terms of location or anything else?

9 MR. SCHWARTZ: We would ask that Mr. Archer be
10 designated to a facility close to his home.

11 THE COURT: Yes. And that recommendation will be
12 made.

13 So, before I read Mr. Archer his appellate rights, I'd
14 like to discuss a surrender date within approximately 60 days.

15 Mr. Schwartz, do you want to talk to Mr. Archer about
16 dates?

17 MR. SCHWARTZ: Yes, although I do have an application,
18 your Honor.

19 I would ask for you to consider staying imposition of
20 the sentence pending appeal. Given the material appellate
21 issues, including with respect to the sentencing issue that
22 we've been discussing and the nature of the sentence, it's
23 highly likely that if Mr. Archer is required to report within
24 approximately 60 days, that he will serve on most or all of
25 that sentence before an appeal is adjudicated. I think in

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1 similar circumstances, district courts or the Court of Appeals
2 have stayed the imposition of sentence pending appeal. I think
3 that would be appropriate here.

4 THE COURT: Why don't you do this: Why don't you
5 write me a letter setting forth the basis of the appeal - I'm,
6 obviously, familiar with the arguments you've made today - and
7 I will let the government respond. So I won't set a surrender
8 date today, but I'll consider your arguments with respect to
9 the stay for purposes simply of appeal.

10 Okay?

11 MR. SCHWARTZ: Yes. I'm sorry, I missed a word. You
12 will or you won't set a surrender date today?

13 THE COURT: I'm not going to set a surrender date
14 today. I'll get your letter within a week, I'll get the
15 government's response within a week, and I will rule promptly
16 on the appropriateness of that.

17 MR. SCHWARTZ: Thank you.

18 THE COURT: And it would be helpful if you can cite to
19 other cases in which a stay of that sort was or was not
20 granted.

21 MR. SCHWARTZ: Absolutely.

22 THE COURT: Thank you.

23 So that's the sentence of this Court.

24 Mr. Archer, you have a right to appeal your conviction
25 and sentence. If you so choose to appeal, the notice of appeal

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1 must be filed within 14 days of the judgment of conviction. If
2 you're not able to pay for the costs of an appeal, you may
3 apply for leave to appeal in forma pauperis, which simply means
4 that court costs, such as filing fees, will be waived.

5 If you request, the Clerk of Court will prepare and
6 file a notice of appeal on your behalf.

7 At sentencing, I often say this because I firmly
8 believe it to be true, I don't think people need to be defined
9 by the worst mistakes they ever make, and while I know you
10 maintain your innocence, you also acknowledge making serious
11 mistakes, and you talked about this a little bit in what you
12 said today. I'll say to you what I say to others often at
13 sentencing: I don't think you need to be defined by this case,
14 even though I know it's hard to believe that right now. As you
15 noted, you are so lucky to have so many supportive family
16 members and friends and ability to help others through
17 volunteering, working with youth and charity, and nothing is
18 going to take any of that away from you.

19 Are there any other applications at this time?

20 MR. SCHWARTZ: No, your Honor.

21 MS. MERMELSTEIN: No, your Honor, except to say that
22 we move to dismiss the underlying counts. The trial was a
23 superseding indictment, so there are underlying indictments.

24 THE COURT: The underlying indictment will be
25 dismissed.

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1 All right. Thank you. We are adjourned.

2 (Pause)

3 THE COURT: My deputy just raised an issue about
4 timing. You can't file your notice of appeal, as you know,
5 until the judgment is issued, and the judgment won't be issued
6 until we have a surrender date in it.

7 Do you think that's right? Do you think -- just give
8 me one second.

9 (Pause)

10 THE COURT: I think it's fine. I think it's fine.
11 I'll issue the judgment. I won't mention a surrender date.
12 I'll get your letters in a week and a response within a week of
13 that. I'll rule promptly on the motion for the stay. If I
14 deny the stay, I'll promptly set a surrender date, but I think
15 I can move forward on the judgment.

16 Okay?

17 Thank you.

18 * * *